of a private use. This position raises a large question upon which the authorities are not in harmony, and upon which the phraseology of constitutions and statutes has an important bearing. LEWIS, EMINENT DOMAIN, § § 62-68. The cases in New York, though not free from doubt, give much support to the narrow doctrine quoted above from the principal case. *Story* v. *N. Y. El. R. Co.*, 90 N. Y. 122; *Uline* v. *N. Y. C. & H. R. R. Co.*, 101 N. Y. 98; *Lahr* v. *Met. El. R. Co.*, 104 N. Y. 268. But, granting that the broader position might have furnished adequate ground for these cases, the theory upon which they were put by the courts which decided them is that the covenantee had property rights in the land of the covenantor, which are taken by a use inconsistent with the covenant. These cases thus stand alongside of *In re Nisbet and Pott's Contract,* [1905] 1 Ch. 391; [1906] 1 Ch. 386, as establishing the "real" character of equitable easements. And, if it be conceded that these are rights *in rem,* it is extremely difficult to differentiate any of the other equitable interests. E. N. D.

PUBLIC OPINION AND JUDICIAL OPINION.—The day is not yet past when we hear the clamor for recall of judicial decisions or other like measures of popular control of judicial opinion. Nor will the day pass when politicians can single out a particular decision and with it "prove" that the courts are reactionary. We may, therefore, now and then expect proposals for the restriction of judicial independence; and a few words on the actual attitude of the courts will not be out of place.

Most of the criticism is of course directed to the practice of the courts in declaring void social legislation, and especially that dealing with labor problems. That much of this criticism is justified has been the opinion of writers in this and other legal periodicals. See 13 MICH. L. REV., 497; 29 HARV. L. REV., 353. But while criticism may be just, it does not necessarily lead to the conclusion that courts need be controlled directly by popular vote. For much that such a proposal is intended to do is already accomplished in a more effective and less ponderous way.

No observer of social facts can escape the feeling that popular opinion as manifested by the ballot is often a mere passing whim, and unfortunately is affected too often by local and personal considerations. The "dear people" are capricious. An election is not necessarily an accurate barometer of public opinion. There are other ways in which it makes itself felt, through the press, the forum, discussion, and through every other type of communication. It is impossible to suppose that lawyers and judges, participating in public affairs and in touch constantly with public opinion, will be unaffected. They are only human and their ideas will change under pressure of their neighbors' views. This is a result always to be expected in human institutions. A few cases will illustrate what is meant.

In 1895 the supreme court of Illinois was called upon to decide upon the constitutionality of a law limiting to eight hours a day the time during which women, employed in factories and workshops, might labor. It regarded this law as a "purely arbitrary restriction upon the fundamental right of the citizen to control his or her own time and faculties. It sub-

stitutes the judgment of the legislature for the judgment of the employer and employee in a matter about which they are competent to agree with each other." *Ritchie* v. *The People,* 155 Ill. 98, 108. Fifteen years later, in 1910, a law the same, except that the limit was placed at ten instead of eight hours, came before that court. *Ritchie & Co.* v. *Wayman,* 244 Ill. 509. There the court said, "As weakly and sickly women cannot be the mothers of vigorous children, it is of the greatest importance to the public that the state take such measures as may be necessary to protect its women from the consequences induced by long, continuous manual labor in those occupations which tend to break them down physically"; and the law was upheld. The main distinction between the cases is that one deals with an eight-hour law and the other with a ten-hour law, but this has been looked upon as not distinguishing the cases in principle. 29 HARV. L. REV., 356. There is evidently a change in the court's views; in the first case there is emphasis on the liberty of contract, but in the second on the necessity of protecting the health of women. Again in *People* v. *Williams,* 189 N. Y. 131, the court had to consider a statute prohibiting the labor of women in factories, between nine o'clock in the evening and six o'clock in the morning. The statute was declared invalid and the court remarked: "When it is sought under the guise of a labor law, arbitrarily, as here, to prevent an adult female citizen from working at any time of the day that suits her, I think it is time to call a halt. It arbitrarily deprives citizens of their right to contract with each other. The tendency of legislation, in the form of regulatory measures, to interfere with the lawful pursuits of citizens is becoming a marked one in this county, and it behooves the courts, firmly and fearlessly, when invoked, to protect against legislative acts plainly transcending the power conferred by the constitution upon the legislative body." The opinion was delivered in 1907. In 1915, in *People* v. *Schweinler Press,* 214 N. Y. 395, the same law again came before the same court. After reviewing the report of the Factory Investigating Committee, and discussing the facts upon which such legislation was based, the court concluded that the law was valid. "There is no reason," it said, "why we should be reluctant to take a different view of such a vastly important question as that of public health and disease than formerly prevailed." There could be no clearer change of position, and the opinion is clear evidence that the change was induced by the public opinion that had been brought to bear upon the question. Another instance of this same sort of shifting by the court can be seen in examining the cases of *Rodgers* v. *Coler,* 166 N. Y. 1, and *Ryan* v. *City of New York,* 177 N. Y. 271. The cases involved the fixing of a minimum rate of wages for labor on public works. The attempt was declared invalid in the first case, but valid in the second. During the periods covered by these six cases the trend of public opinion was clearly in favor of such laws as these. During that period periodical literature, legislative reports, public addresses and political issues were based upon these questions. Public opinion became crystallized; and the change in the attitude of the courts illustrates the simple fact of human nature that men's opinion are largely dominated by the opinions of those about them.

But the mere change in attitude is in itself not the most important matter to be considered. That may be interesting enough, but a more important fact in recent judicial opinion is the conscious recognition of public opinion in the deliberations of the courts. The courts are looking to public opinion; and the cases which do so may be looked upon as introducing a new type of judicial notice, a notice of the state of public opinion upon the particular question before the court. It is taken as a factor in determining the validity of the statute. This process was suggested by Mr. Justice HOLMES in *Lochner* v. *New York,* 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937, when he said, "The word 'liberty', in the fourteenth amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law." Compare with that statement the words in the majority opinion, "The act * * is an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts". The former gives weight to the dominant opinion, the other looks to an abstract theory of personal rights. Other courts seem to be following the opinion advanced by Mr. Justice HOLMES. In the case of *Ritchie & Co.* v. *Wayman, supra,* the court said, "We think the general consensus of opinion, not only in this county but in the civilized countries of Europe, is that a working day of not more than ten hours for women is justified for the following reasons". Here follow the reasons, and the court continues, "These conditions are so far matters of general knowledge that the courts will take judicial cognizance of their existence". And substantially the same was said in *People* v. *Schweinler Press, supra.*

We may turn for another instance of this attitude to *Washington* v. *Feilen,* 70 Wash. 65, 126 Pac. 75, 41 L. R. A. (N.S.) 418, where the court reviewed a statute providing for the sterilization of criminals. The following is from the opinion: "There appears to be a wonderful unanimity of favoring opinion as to the advisability of the sterilization of criminals and the prevention of their further propagation. The Journal of the American Medical Association recommends it, as does the Chicago Physicians' Club, the Southern District Medical Society, and the Chicago Society of Social Hygiene. The Chicago Evening Post, speaking of the Indiana law (to the same effect) says that it is one of the most important reforms before the people, that 'rarely has a big thing come with so little fanfare of trumpets'. The Chicago Tribune says that 'the sterilization of defectives and habitual criminals is a measure of social economy.'" For more cases illustrating this tendency see *State* v. *Somerville,* 67 Wash. 638, 122 Pac. 324; *Stettler* v. *O'Hara,* 69 Ore. 519, 139 Pac. 743, the latter being a minimum wage law for women and children; *Malette* v. *Spokane,* 77 Wash. 205, 51 L. R. A. (N. S.) 686, 700, 703; *Jacobsen* v. *Massachusetts,* 197 U. S. 11, 49 L. Ed. 643; *Muller* v. *Oregon,* 208 U. S. 412, 52 L. Ed. 551.

Remarks of the court in the last two cases are particularly significant. In the *Jacobsen* case the court quoted with approval from *Viemeister* v. *White,* 179 N. Y. 235. "In a free country, where the government is by the people, through their chosen representatives, practical legislation admits of no other standard of action, for what the people believe is for the common welfare must be accepted as tending to promote the common welfare, whether it does in fact or not." In *Muller* v. *Oregon,* Mr. Justice BREWER used the following language: "Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and this gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long-continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge."

These words of the justices show, we believe, a tendency on the part of the courts consciously to regard public opinion. But the questions with reference to which the courts may take such notice is necessarily limited. The force of public opinion itself could never induce the court to hold that a trial by a jury of less than twelve in the federal courts would be constitutional; nor could it force the courts to give to the states power over foreign or interstate commerce, or permit legislation based upon race discrimination. Those are rules strictly laid down by the constitution, which only an amendment could alter. But laws enacted in exercise of the police power of the state are of the sort where public opinion may advantageously be recognized. In this kind of legislation there is generally some private right violated or abridged, and this abridgement can be excused only if the law in question is calculated to promote the public welfare. If it is reasonably adapted to such an object it must be upheld; if, on the other hand, it clearly has no relation to the public good, it must be declared invalid. To determine this question is the business of the court.

By what means shall the court determine whether or not the law bears a reasonable relation to the public welfare? One means of doing it is by resorting to some social theory, and applying the theory to the case in hand. This has, we feel, been done in a number of cases. *Lochner* v. *New York,* supra; *Ritchie* v. *People,* supra; *People* v. *Williams,* supra; *Adair* v. *United States,* 208 U. S. 161; *Coppage* v. *Kansas,* 236 U. S. 1. Another method is by examining the "state of the art", as Mr. Justice BREWER has said, and determining whether in fact the law is related to the general welfare. And the third way is by resorting to public opinion on the particular question. The last two are closely connected, and when the court looks to the fact of the case it generally regards also the state of public opinion with reference to the question, and necessarily some social theory must be in the background. The value of looking to public opinion

is that it enables the court to judge more intelligently of the actual relation of the law to the general need. The argument is this: if the strong, almost universal, opinion of the people is favorable to a law of the sort in question and endorses it as a means of social betterment, it is probable that the law is well calculated to attain that object; it must then be upheld as a just exercise of the police power.

To be of value, however, it would seem that public opinion on the question must be in an advanced stage of development. If the opinion were quite evenly divided so that the current against the law were as powerful and widespread as that favoring it, the court could derive little aid from the situation. To be guided by one set would require a holding that the law is clearly not adapted to a public object, and to follow the other would mean the opposite result. Such a situation results in a state of confusion, and the court would be forced to rely upon its own instincts and knowledge. Nor is the opinion of value when it is temporary or hysterical. In such a case we could well apply the words of the court in *Ives* v. *South Buffalo Ry Co.*, 201 N. Y. 271, "In a government like ours theories of public good or necessity are often so plausible or sound as to command popular approval, but courts are not permitted to forget that the law is the only chart by which the ship of state is to be guided." Only when public opinion has become crystallized so that there is a dominant opinion will the court utilize it to advantage. As above stated, the belief in the necessity and effectiveness of the enactment must be "widespread and long-continued". Not until we have those conditions does the argument of probability as we have stated it arise.

But even if popular approval were positive upon the question before the court, it would not be decisive on the court's action. We may imagine a situation where public opinion has definitely been formed in endorsing a statute, and yet the court might feel that the law was beyond doubt not related to the general good. Such a stand would perhaps require great courage, but it is not an impossible one. In that case we apprehend it would be the duty of the court to invalidate the law. Public opinion is a thing to be considered, it is a strong factor, a very persuasive element, but it is not final.

However that may be, the great consideration is that courts do not turn their backs to public opinion, but are coming more and more to appreciate its value and give it a place in their deliberations. Thus do they keep constantly in touch with advances in learning and in the ideals of government and action. On the other hand, their inherent freedom from direct public compulsion enables them to disregard those waves of public sentiment which are temporary aberrations, and which, with the recall of decisions, would cause irreparable havoc. The court stands in the middle ground. Like a true statesman, it lends one ear to public opinion and the other to the established institutions, ideas and traditions of our people. In that way the intelligent court may be the balance-wheel of progress.

W. W. S.